

<sup>1</sup> P.A.H. Trans. at 7.

**ISSUES**

This is a request by Mr. Updegraff for post-award attorney fees for opposing respondent's request for an order determining respondent had satisfied its obligation to decedent's dependents under a December 22, 1983, settlement hearing award and terminating benefits.

This is the third time this claim has been before this Board. A brief procedural history is helpful in understanding the present controversy.

After the December 1983 settlement hearing award, respondent paid death benefits as provided by the Workers Compensation Act. However, on November 21, 2002, respondent filed an application for review and modification contending respondent and its insurance carrier had satisfied their obligations under the settlement hearing award. The application stated, in part:

The respondent and insurance company believe that they have satisfied all of their obligations under the friendly settlement award and desire to have a determination made that they owe no further benefits to the claimant's dependant *[sic]*.

Later, on April 16, 2003, respondent filed a document entitled Application to Determine Obligations Under Settlement Agreement.

Judge Frobish conducted a hearing on January 16, 2003, to address respondent's application. And on January 17, 2003, the Judge entered an Order that held the decedent's son was entitled to receive death benefits under the Workers Compensation Act as long as he remained a full-time student. Respondent appealed that Order to this Board. In an Order dated July 31, 2003, the Board reversed the Judge's decision as the Board held respondent's obligation to pay death benefits to decedent's son had ended. The Board's Order also remanded this claim to the Judge to determine a reasonable attorney fee for Mr. Updegraff.

The decedent's son appealed the Board's July 31, 2003, Order to the Kansas Court of Appeals. While the appeal to the Kansas Court of Appeals was pending, Judge Frobish entered an August 18, 2003, Order<sup>2</sup> and a September 8, 2003, Order Nunc Pro Tunc in which the Judge ordered respondent to pay Mr. Updegraff \$1,693.75 in attorney fees for representing the decedent's son in these post-award matters. Respondent appealed those orders to this Board but the parties later agreed to set aside the order for payment of

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<sup>2</sup> Judge Frobish entered that Order after Mr. Updegraff sent the Judge an itemized statement setting forth the services he had rendered in these post-award matters from November 21, 2002, through July 18, 2003.

attorney fees. Moreover, the parties also agreed to reserve all issues regarding attorney fees until the Kansas Court of Appeals had decided the appeal. But the Kansas Court of Appeals did not review the Board's July 2003 Order as the appeal was dismissed.

Next, Judge Frobish conducted a February 10, 2004, hearing to address Mr. Updegraff's request for post-award attorney fees. At the conclusion of that hearing, Judge Frobish determined Mr. Updegraff was entitled to receive attorney fees for the services he rendered the decedent's son in these post-award matters. The Judge's Order, which was dated February 10, 2004, held, in part:

Because this was a question of interpretation of the statute rather than a factual issue entitling the Claimant to additional compensation, the Court feels that Post-Award attorney fees are appropriate in this matter and will allow the previous Order to stand.

And it is that February 10, 2004, Order which is now before the Board on this appeal.

Respondent argues the Judge erred as the January 17, 2003, ruling in which the Judge refused to terminate respondent's obligation to pay benefits purportedly constituted an award of additional compensation. Accordingly, respondent argues any attorney fees due Mr. Updegraff should be taken from the "additional" compensation that respondent paid between the date of the Judge's January 17, 2003, Order and the Board's July 31, 2003, Order.

The only issue before the Board on this appeal is whether an attorney who represents a decedent's dependents in a post-award hearing to determine whether an employer has satisfied its obligation to pay death benefits under the Workers Compensation Act is entitled to receive attorney fees at the employer's expense under K.S.A. 44-536(g).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire file and after considering the parties' arguments, the Board finds and concludes:

The decedent died as the result of an August 28, 1983, accident that occurred while working for respondent. On December 22, 1983, the parties appeared at a settlement hearing in which the decedent's dependents were awarded workers compensation death benefits for the maximum provided by law.

We will not repeat the procedural history as set forth above but will only add any pertinent information regarding these post-award matters.

Mr. Updegraff began representing the decedent's son, Bryce B. Dawson, after respondent filed documents with the Division of Workers Compensation requesting an order that respondent had satisfied the December 1983 settlement hearing award.

Mr. Updegraff represented the decedent's son at the January 16, 2003, hearing before Judge Frobish and in the later appeal to this Board. This claim now returns to the Board upon Mr. Updegraff's request for attorney fees for the services he rendered the decedent's son in that litigation.

Mr. Updegraff does not challenge the \$1,693.75 the Judge previously determined was appropriate for representing the decedent's son. But in his brief to this Board, Mr. Updegraff requests fees for the time expended in connection with the February 10, 2004, hearing before the Judge and for the time expended on this present appeal. Consequently, Mr. Updegraff seeks to have the Judge's orders affirmed and also requests the Board to remand this claim to the Judge to determine the appropriate fee for these latest services.

The Board affirms the Judge's determination that Mr. Updegraff is entitled to receive attorney fees for opposing respondent's request for an order decreeing respondent had satisfied its obligation to pay death benefits under the Workers Compensation Act.

The Workers Compensation Act provides that an attorney who represents an employee or an employee's dependents is entitled to reasonable attorney fees for services rendered after the ultimate disposition of the initial and original claim. And if those legal services result in an award of additional disability compensation, the claimant's attorney fees shall be taken from the additional compensation. But if no additional compensation is awarded, the respondent may be ordered to pay the claimant's attorney fees. The Act provides:

In the event any attorney renders services to an employee or the employee's dependents, **subsequent to the ultimate disposition** of the initial and original claim, and in connection with an **application for review and modification**, a hearing for additional medical benefits, an application for penalties **or otherwise**, such attorney **shall** be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of

disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. **If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.**<sup>3</sup> (Emphasis added.)

Respondent argues it should not be responsible for Mr. Updegraff's attorney fees as the Judge's January 17, 2003, Order granted the decedent's son additional compensation. The Board disagrees.

The December 1983 settlement hearing award granted the decedent's dependents the maximum death benefits due under the Workers Compensation Act for a worker's death. Accordingly, the post-award services rendered by Mr. Updegraff did not result in additional compensation. Following the December 1983 settlement hearing award, respondent was paying death benefits pursuant to that award. The post-award proceeding to determine if respondent had satisfied its obligation under the settlement hearing award did not result in an award of additional benefits. Instead, the post-award proceeding ultimately resulted in the termination of benefits as the Board held respondent had satisfied its obligation under the Act. The post-award proceeding initiated by respondent was analogous to a declaratory judgment action in a civil proceeding. Pragmatically, Mr. Updegraff was opposing the respondent's attempts to terminate benefits.

The Board holds that Mr. Updegraff is entitled to reasonable attorney fees under K.S.A. 44-536(g). Accordingly, this claim should be remanded to the Judge to determine the amount of attorney fees, if any, Mr. Updegraff is entitled to receive for the time and effort expended for the February 10, 2004, hearing before Judge Frobish and the time expended on this appeal. The parties do not challenge the Judge's finding that Mr. Updegraff is entitled to receive \$1,693.75 in attorney fees for the post-award services rendered from November 21, 2002, through July 18, 2003. Therefore, the Board affirms that amount for those services.

### **AWARD**

**WHEREFORE**, the Board remands this claim to the Judge for further proceedings consistent with the above. The Board does not retain jurisdiction of this appeal.

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<sup>3</sup> K.S.A. 44-536(g).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Martin E. Updegraff, Attorney for Bryce B. Dawson  
Terry J. Torline, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director